ORAL ARGUMENT NOT YET SCHEDULED

SUPPLEMENTAL BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 08-2036

COUNCIL TREE COMMUNICATIONS, INC., BETHEL NATIVE CORPORATION, AND THE MONORITY MEDIA AND TELECOMMUNICATIONS COUNCIL,

PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA

RESPONDENTS.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

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STATEMENT OF JURISDICTION

Petitioners Council Tree Communications, Inc., Bethel Native Corporation and the Minority Media and Telecommunications Council (collectively, "Council Tree" or "petitioners") seek review of three rulemaking orders issued in WT

Docket No. 05-211[1] and a *Public Notice* issued in AU Docket No. 06-30.[2] The *Second R&O* on review was published in the Federal Register on May 4, 2006, the *Reconsideration Order* on review was published in the Federal Register on June 14, 2006, and the *Second Reconsideration Order* was published in the Federal Register on April 4, 2008. This Court has jurisdiction to review Council Tree's challenge to these three orders under 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342, 2344, because petitioners filed their petition for review (on April 8, 2008) within 60 days after Federal Register publication of the *Second Reconsideration Order.*

The Court lacks jurisdiction to consider petitioners' challenge to the *Auction Public Notice.* That Commission document – which announced an August 9, 2006, commencement date and established filing requirements for an auction of licenses for Advanced Wireless Service ("AWS") – was issued in a different administrative docket from the rulemaking orders under review, and was not subject to reconsideration proceedings that could toll the time for filing a judicial challenge.

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[1] *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures* (WT Docket No. 05-211), Second Report and Order and Second Further Notice of Proposed Rulemaking, 21 FCC Rcd 4753 (released April 25, 2006), 71 Fed. Reg. 26245 (May 4, 2006) (JA 82) ("*Second R&O*"); Order on Reconsideration of the Second Report and Order, 21 FCC Rcd 6703 (released June 2, 2006), 71 Fed. Reg. 34272 (June 14, 2006) (JA 142) ("*Reconsideration Order*"); Second Order on Reconsideration of the Second Report and Order, 23 FCC Rcd 5425 (released March 26, 2008), 73 Fed. Reg. 18528 (April 4, 2008) ("*Second Reconsideration Order*") (SJA 29).

[2] Auction of Advanced Wireless Services Licenses Rescheduled for August 9, 2006 (AU Docket No. 06-30), 21 FCC Rcd 5598 (released May 19, 2006) ("*Auction Public Notice*") (Pet. Supp. Br., Addendum 1).

Council Tree's April 8, 2008, petition for review was untimely filed more than 60 days after the May 19, 2006, entry of the *Auction Public Notice*. *See* 28 U.S.C. § 2344.

STATEMENT OF ISSUES

1. Whether the Commission lawfully promulgated the designated entity eligibility rules set forth in the *Second R&O* and the *Reconsideration Order*.

2. Whether, if the Commission's promulgation of those rules was legally flawed, the appropriate remedy is limited to remanding those rules to the agency for further proceedings, and does not include either petitioners' request for vacatur of those rules or the nullification of auctions.

STATEMENT OF THE CASE

This case involves Council Tree's renewed attempt to challenge rule revisions that the Commission adopted in 2006 to tighten eligibility standards for bidding credits awarded to certain small businesses – known as "designated entities" or "DEs"[3] – in auctions for spectrum licenses due to reported abuses of the DE program. Council Tree previously challenged those rules in Case No. 06-2943, but this Court dismissed that petition for review as "incurably premature" with respect to both the *Reconsideration Order* (because Council Tree's petition

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[3] *See* 47 U.S.C. §§ 309(j)(3)(B) & 309(j)(4)(D). Though the Commission's rules define "designated entities" as "small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies" (47 C.F.R. § 1.2110(a)), after the Supreme Court decided *Adarand Constructors v. Pena*, 515 U.S. 200 (1995), DE bidding credits have been available only to small businesses and, to a lesser extent, rural telephone companies. *See Second R&O* ¶ 3 n.8 (JA 84).

for review had been filed prior to Federal Register publication of that order) and the *Second R&O* (because petitioners had filed a petition for administrative reconsideration that remained pending before the agency). *Council Tree Communications, Inc. v. FCC*, 503 F.3d 284, 287-88 (3d Cir. 2007) ("*Council Tree I*"). Now that the Commission has formally denied petitioners' reconsideration petition in the *Second Reconsideration Order*, Council Tree returns to this Court to challenge the DE rules adopted in the *Second R&O* and *Reconsideration Order*, and asks the Court to vacate two major auctions of spectrum licenses.

STATEMENT OF FACTS

The regulatory background concerning the Commission's auction program for spectrum licenses, including measures the agency has adopted to promote participation in such auctions by DEs, is set forth in the government's October 13, 2006, brief in Case No. 06-2943. *See* Respondents' Br. 5-8.[4] So too is a detailed description of the administrative proceedings that led to the adoption of the challenged *Second R&O* and the *Reconsideration Order*. *Id.* 8-15. We recount that history only briefly here.

The DE Rulemaking Proceeding (WT Docket No. 05-211). In recent years, FCC officials had become aware of troubling loopholes in the DE program, as some entities had been "put[ting] themselves forward as small companies in order to qualify for auction discounts" despite having entered into agreements to

[4] By order, dated June 23, 2008, this Court ordered that the record in Case No. 06-2943 be incorporated into the current review proceeding.

lease their prospective spectrum rights to non-DEs,[5] and others reportedly had acquired discounted licenses not for the purpose of pursuing "actual business operations" but "as investments to be later sold for profit in the after-market."[6] When Council Tree submitted a proposal to tighten some of the eligibility rules for DE benefits,[7] the Commission, in February 2006, issued a *Further Notice* that took Council Tree's proposal as a point of departure for seeking comment on measures to "prevent companies from circumventing the objectives of the designated entity eligibility rules" and to ensure that DE benefits are "available only to bona fide small businesses." *Further Notice* ¶¶ 6, 7 (JA 65).

The Commission's April 2006 *Second R&O*, issued in response to the record developed in proceedings on the *Further Notice*, tightened the agency's DE rules in two relevant respects. First, presented with arguments from a broad array of commenters (including Council Tree and the Justice Department's Antitrust Division) that leasing and resale arrangements could be ripe for abuse,[8] the Commission adopted eligibility restrictions with respect to such arrangements

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[5] *See Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures* (WT Docket No. 05-211), Further Notice of Proposed Rulemaking, 21 FCC Rcd 1753, 1771 (2006) (Statement of Commissioner Copps) (JA 79) ("*Further Notice*")

[6] *United States v. Gabelli*, 345 F. Supp. 2d 313, 321-22 (S.D.N.Y. 2004); *see* John R. Wilke, *Gabelli, U.S. Discuss Settlement In Fraud Case*, Wall Street J., June 1, 2006, at A3.

[7] *See Further Notice* ¶ 1 & n.4 (JA 61).

[8] *See* Respondents' Br. 10 & n.17 (Case No. 06-2943) (cataloguing comments).

designed to ensure that every recipient of DE benefits is an entity that uses its licenses to provide facilities-based telecommunications services directly to the public. *Second R&O* ¶¶ 21-27 (JA 91-93). Second, to complement the new lease/resale-related restrictions and to address concerns about license "flipping,"[9] the Commission strengthened its "unjust enrichment" rules – extending from five years to 10 years the period during which a DE will have to repay some or all of its bidding credits if it attempts to transfer its license to a non-DE for a windfall or it otherwise loses eligibility for those benefits. *See id.* ¶¶ 31, 36-41 (JA 94, 95-98).

On May 5, 2006, Council Tree filed a petition for expedited reconsideration of the *Second R&O*. *See Reconsideration Order* ¶ 1 n.2 (JA 143). The following month, the Commission issued the *Reconsideration Order*, which (with some clarifications) affirmed the actions the agency had taken in the *Second R&O*. Although the Commission issued that order "on [its] own motion," *Reconsideration Order* ¶ 1 (JA 142), and thus did not formally dispose of Council Tree's reconsideration petition, the order responded in detail to the major criticisms Council Tree had raised on reconsideration and rejected them. Indeed, Council Tree would later stress to this Court that the *Reconsideration Order* contained "over forty separate references" to petitioners and "rejected all of Petitioners' key arguments." Petitioners' Petition for Mandamus, No. 07-4124, at 6 & n.5 (filed October 23, 2007).

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[9] *See* Respondents' Br. 10-11 & n.19.

On July 24, 2006, Council Tree informed the Commission that it viewed further agency proceedings on its reconsideration petition to be "a meaningless procedural formality" because the agency already had "reviewed the substance" of its petition in the *Reconsideration Order* and had "denied Petitioners' requested relief." Letter from Dennis Corbett to FCC Secretary, WT Docket No. 05-211, at 1 (July 24, 2006) ("Dismissal Letter") (SJA 131). Council Tree accordingly asked the Commission to "dismiss" the reconsideration petition. *Id.* at 2 (SJA 132). On March 26, 2008, after this Court held that Council Tree's petition for reconsideration was nonetheless still pending (*see* below), the Commission granted Council Tree's request by "formally deny[ing]" its reconsideration petition. *Second Reconsideration Order* ¶ 1 (SJA 29). The Commission "agree[d] with [Council Tree] that we already [had] decided the merits" of the reconsideration petition in the *Reconsideration Order*. *Id.* ¶ 3 (SJA 30). In light of that fact and Council Tree's demonstration in the Dismissal Letter that it was "no longer seeking reconsideration" of the *Second R&O*, the Commission formally denied Council Tree's reconsideration petition. *Id.* ¶¶ 3-4 (SJA 30).

Court Proceedings In Docket 06-2943. On June 7, 2006 – a week before Federal Register publication of the *Reconsideration Order* – petitioners filed a petition for review of the *Second R&O*, the *Reconsideration Order*, and the *Auction Public Notice*, and contemporaneously filed a motion asking the Court to stay the effectiveness of the newly-adopted DE rules and the then-upcoming AWS auction ("Auction 66") pending judicial review on the merits. In their June 7 petition for review, petitioners asserted that the Court had jurisdiction to consider

their challenge – notwithstanding petitioners' prior filing of a petition for reconsideration of the *Second R&O* (*see West Penn Power Co. v. EPA*, 860 F.2d 581, 587 (3d Cir. 1988)) – because the *Reconsideration Order* "effectively rule[d] on the substance" of their reconsideration petition. Pet. for Review at 3 (Case No. 06-2943).

On June 29, 2006, a motions panel of this Court agreed with petitioners' jurisdictional argument – concluding that "the *Reconsideration Order* effectively disposed of" petitioners' reconsideration petition "on the merits," rendering the orders on review "final" and thus subject to the Court's jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). Order, No. 06-2943, filed June 29, 2006, at 4 ("*Stay Denial Order*"). The panel went on to deny petitioners' stay request. It "form[ed] no opinion" on the merits of petitioners' challenge at that point, but found that "[t]he public interest * * * militates strongly in favor of letting the [upcoming AWS] auction proceed without altering the rules of the game at this late date." *Stay Denial Order* at 5 n.1, 6.

Briefing and argument on the merits followed. Petitioners argued that the revised DE rules were adopted without adequate Administrative Procedure Act ("APA") notice and, relying in part on the post-record results of the AWS auction (which had been conducted during August and September 2006), claimed that the rules were otherwise arbitrary and inconsistent with the Communications Act. *See* Petitioners Br. 18-19 (Case No. 06-2943). Petitioners asked the Court to vacate the rules and overturn the auction. *Id.* at 55. The FCC and United States as respondents argued that the Court lacked jurisdiction to consider petitioners'

challenge because their petition for review was "incurably premature." Respondents' Br. 21-25. On the merits, respondents (and intervenors CTIA and T-Mobile USA, Inc.) argued that the DE rules were lawful, and that, in any event, there was no basis for the draconian and disruptive remedy of overturning the AWS auction. *See* Respondents' Br. 17-19; Intervenors' Br. 1-3 (filed Oct. 13, 2006). Echoing this latter point, a number of DEs that had won licenses in the AWS auction filed an amicus brief – arguing that they had "expended significant resources to arrange financing, prepare for the auction, and participate in the bidding." Brief of Amici Curiae American Cellular Corporation, *et al.* at 3 (filed Oct. 20, 2006). Amici stated that they were "poised to provide their customers with valuable new services," and that "any decision to overturn Auction 66 would irreparably harm Amici, their customers, and consumers nationwide." *Ibid.*

On September 28, 2007, this Court dismissed petitioners' judicial challenge without addressing the merits. The Court found that petitioners' challenge was "incurably premature" with respect to both the *Reconsideration Order* (because Council Tree's petition for review had been filed prior to Federal Register publication of that order) and the *Second R&O* (because petitioners had filed a petition for administrative reconsideration that remained pending before the agency). *Council Tree I*, 503 F.3d at 287. The Court denied petitions for rehearing of its decision on February 15, 2008. The Court also denied a Council Tree request for mandamus, although it directed the Commission to provide a schedule for deciding the reconsideration petition. *Order*, No. 07-4124 (Feb. 15, 2008).

Compliance was mooted by the Commission's issuance of the *Second Reconsideration Order*.

Related Developments. The Commission has conducted two major auctions of spectrum licenses (as well as several smaller auctions) under the DE eligibility rules adopted in the *Second R&O* and *Reconsideration Order*.

The first such auction – for Advanced Wireless Service licenses (Auction 66) – commenced on August 9, 2006, and closed on September 18, 2006. That auction raised more than $13.7 billion in winning bids (net of bidding credits).[10] DEs comprised 100 of the 168 total qualified bidders in the auction and 57 of the 104 total winning bidders, and two DEs were among the top ten winning bidders. *See* Respondents' Br. 16 (Case No. 06-2943) (citing Auction of Advanced Wireless Services Licenses Closes, *Public Notice*, DA 06-1882, Attachment A (rel. September 20, 2006) ("*Auction 66 Closure Notice*")).[11] As of April 30, 2007, the Commission had finished processing the winning bidders' license applications and had granted all but one of the licenses won in the auction, *see FCC News Release,* Wireless Telecommunications Bureau Completes Review of Applications for

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[10] Federal Communications Commission, Auctions Summary, http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=66 (last visited September 13, 2008).

[11] In all, DEs won 215 of the 1087 (or 20%) of the auctioned licenses . *See* Oral Statement of FCC Chairman Kevin J. Martin Before the House Committee on Energy and Commerce, Exhibit 3 (April 15, 2008) ("*April 15 Martin Statement to Congress*"). Chairman Martin's Oral Statement is available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281580A1.pdf. The exhibits to that statement are available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281580A2.pdf.

Licenses for Advanced Wireless Services (April 30, 2007) (attached to FCC 28(j) letter, dated May 4, 2007, Case No. 06-2943)), and the final license was granted in December 2007, *see Public Notice*, Report No. 3672 (Dec. 19, 2007). Proceeds from the auction have been distributed to federal agencies to assist in the relocation of federal users from the AWS spectrum.[12] And the roll-out of broadband service by Auction 66 license winners is now well underway.[13]

On March 20, 2008, the Commission announced the conclusion of Auction 73, the second major auction of spectrum licenses conducted under the revised DE rules. Auction of 700 MHz Band Licenses Closes; Winning Bidders Announced for Auction 73, *Public Notice*, DA 08-595 (March 20, 2008) ("*Auction 73 Closure Notice*"). The 700 MHz spectrum at issue in Auction 73 – which is being relinquished by broadcasters in connection with the conversion from analog to digital broadcast television – "is attractive to both industry and public safety organizations because it is especially well-suited for wireless broadband, is capable of carrying large amounts of data, can travel far distances, and easily penetrates

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[12] *See* U.S. Department of Commerce, *First Annual Progress Report: 1710-1755 MHz Spectrum Band Relocation*, at 1-2 (March 2008), available at http://www.ntia.doc.gov/reports/2008/SpectrumRelocation2008.pdf.

[13] T-Mobile, for instance, has informed the Commission that it "has already launched high speed wireless service in New York City" pursuant to licenses obtained in Auction 66, that it plans to "deploy in 25 more markets in 2008," and that it already has "placed about one million AWS-ready handsets either into customer hands or the supply chain." Letter, dated July 18, 2008, from Howard J. Symons, counsel for T-Mobile, to FCC Secretary, WT Docket No. 07-195, Attachment at 3 (available at http://webapp01/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520034787).

walls with great efficiency and speed."[14] Auction 73 raised approximately $19 billion in winning bids, nearly doubling congressional estimates of its likely proceeds. *March 18 Martin Statement* at 1. At the same time, DE participation and performance in the auction was robust: 119 of 214 total qualified bidders and 56 of 101 total winning bidders claimed DE bidding credits. *FCC News Release*, Statement By FCC Chairman Kevin J. Martin (March 20, 2008).[15] And DEs won 35% of all licenses auctioned in Auction 73. *Ibid.* The proceeds of Auction 73 have been transferred to the U.S. Treasury, as required by statute, to support public safety and digital television transition initiatives.[16]

In separate judicial proceedings currently pending in the D.C. Circuit, Council Tree has sought to challenge the conduct of Auction 73 directly by filing a petition for review of the *700 MHz Service Rules Order*. Petition for Review, D.C.

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[14] *FCC News Release*, Statement of FCC Chairman Kevin J. Martin, at 2 (March 18, 2008) ("*March 18 Martin Statement*"), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280887A1.pdf

[15] Available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280968A1.pdf

[16] *See Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Second Report and Order, 22 FCC Rcd 15289 (¶¶ 15, 318) (2007) ("*700 MHz Service Rules Order*") (citing the Digital Television Transition and Public Safety Act ("DTV Act"), Pub. L. No. 109-171 (Title III), 120 Stat. 4 (2006)), petitions for review pending, *CTIA – The Wireless Ass'n & Council Tree Communications, Inc.*, D.C. Circuit Nos. 07-1432 (docketed October 22, 2007) & 07-1454 (docketed November 6, 2007); *March 18 Martin Statement* at 1.

Circuit No. 07-1454 (docketed November 6, 2007).[17] In its petition for review in that case (at 3), Council Tree alleges that the Commission, in the *700 MHz* docket, "turned a deaf ear to showings by Council Tree and others that the application to [the 700 MHz Band auction] of restrictions on wholesaling by [DEs] would inappropriately limit DE participation in the auction." *See also* Council Tree's Non-Binding Statement of the Issues, D.C. Circuit No. 07-1454, at 1-2 (December 13, 2007) (raising the question whether the FCC's "decision to enforce, for [the 700 MHz Band auction], the [existing rules regarding DE] bidding eligibility restrictions and unjust enrichment penalties" was unlawful). On December 21, 2007, Council Tree filed a motion seeking to transfer its petition for review of the *700 MHz Service Rules Order* from the D.C. Circuit to this Court. The D.C. Circuit denied Council Tree's transfer request on April 8, 2008. *Order*, D.C. Circuit Nos. 07-1432 & 07-1454 (April 8, 2008).

SUMMARY OF ARGUMENT

1. In their supplemental brief, petitioners in large measure reargue the merits of the APA notice and statutory authority claims that they presented in *Council Tree I*. The government previously explained why those claims lacked merit, and petitioners' renewed references to their earlier arguments against the DE rules do not strengthen them here.

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[17] Council Tree initially sought review of the *700 MHz Service Rules Order* in this Court (Case No. 07-4119, filed October 23, 2007), but the Court transferred that petition for review to the D.C. Circuit pursuant to 28 U.S.C. § 2112(a), because an earlier-filed challenge to that order already was pending in that court. *Order*, 07-4119 (3d Cir. filed October 31, 2007).

To the extent that petitioners offer new arguments on the merits, they provide no basis upon which to find the Commission's action unlawful. Petitioners contend that the Commission unreasonably failed to consider the allegedly poor DE performance in Auctions 66 and 73 in formally denying their reconsideration petition in the *Second Reconsideration Order*. In their July 2006 Dismissal Letter, however, petitioners told the Commission that it had already decided the merits of their reconsideration petition and asked the agency simply to terminate proceedings on that petition. They cannot plausibly now contend that the Commission erred in granting that request. In any event, DE performance in Auctions 66 and 73 was robust by any reasonably objective standard and does not suggest a defect in the Commission's rules. Petitioners' other arguments lack merit and also are barred, because they were not first presented to the Commission as required by 47 U.S.C. § 405(a).

2. Even if the Court were to find legal flaws in the Commission's DE rules, neither vacatur of those rules nor nullification of Auctions 66 and 73 would be warranted. Petitioners have offered no basis on which to conclude that the Commission would be unable to readopt the same rules in subsequent administrative proceedings after providing further notice or explanation. Remand without vacatur of the rules is the appropriate remedy in such circumstances.

There is even less merit to petitioners' request for nullification of the auctions. Auction 66 is now final and is not on direct review. A finding that the rules under which it was conducted were invalid thus does not provide a basis on which to reach back to unwind the auction results. Similarly, Auction 73 currently

is on direct review in the D.C. Circuit, which has exclusive jurisdiction to consider challenges to its conduct. In any event, even if Auctions 66 or 73 were within the Court's remedial reach here, nullification would be manifestly contrary to the interests of justice, given the disruptive consequences that remedy would cause for license winners, their customers, and the public.

ARGUMENT

I. The Orders On Review Are Lawful

A. Petitioners devote a significant portion of their supplemental brief to rearguing the merits of the APA notice and statutory authority claims they presented in *Council Tree I*. *See* Pet. Supp. Br. 3-5, 12-13, 19 (APA notice), 12-13 (statutory authority). As the government previously demonstrated, however, by reason of the Commission's *Further Notice* and the record developed in response to it, the agency provided sufficient notice of the pertinent subjects and issues addressed in the *Second R&O* and *Reconsideration Order* to satisfy APA standards. *See* Respondents' Br. 26-35. In particular, the government explained that, contrary to petitioners' claim that the *Further Notice* was targeted narrowly to Council Tree's own specific proposals, the notice used "the *elements*" of Council Tree's proposal as a point of departure to seek comment on broader revisions designed to ensure that DE benefits are "available only to bona fide small businesses," and to "prevent companies from circumventing the objectives of the designated entity eligibility rules." Respondents' Br. 27-28 (quoting *Further Notice* ¶¶ 1, 6, 7 (JA 61-62, 65)).

More specifically, the government pointed out that the *Further Notice* expressly sought comment regarding possible restrictions on spectrum leasing and asked "whether other arrangements should be taken into account" in defining the term "material relationship[]" within the meaning of the rule revisions under consideration. *Id.* 29-30 (quoting *Further Notice* ¶ 16 (JA 68)). Contrary to petitioners' claims, such inquiries – along with the Commission's request for comment about "additional restriction[s] on the availability of designated entity benefits," *Further Notice* ¶ 16 (JA 68), "easily encompasse[d] the general leasing/resale-related eligibility restrictions that the Commission adopted." Respondents' Br. 30. The government noted that the adequacy of notice on this question was demonstrated by the fact that comments in the administrative record addressed leasing and resale questions. Respondents' Br. 31-32 (citing, *e.g.*, *Reconsideration Order* ¶ 15 n.54 (JA 151)).

The government also explained in *Council Tree I* that the *Further Notice* had provided ample notice of possible changes in the unjust- enrichment rules. Respondents' Br. 32-35. In particular, the notice had "s[ought] comment on whether, if we adopt a new restriction on the award of bidding credits to designated entities, we should adopt revisions to our unjust enrichment rules" – including possible revisions regarding the "portion of the license term" to which unjust enrichment reimbursement obligations should apply. *Further Notice* ¶ 20 (JA 70).

Finally, the government demonstrated in *Council Tree I* that the revised DE rules adopted in the *Second R&O* and *Reconsideration Order* were reasonable and consistent with the Communications Act's grant of wide latitude to the

Commission to balance competing statutory goals in fashioning the DE program. Respondents' Br. 35-44 (citing generally 47 U.S.C. § 309(j), and *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999)). Petitioners' renewed references to their earlier arguments against the DE rules do not make those arguments any stronger now.

B. Petitioners also offer several new contentions in support of their claim that the DE rulemaking orders on review are unlawful, but these assertions are not properly before the Court, are legally irrelevant, or otherwise are without merit.

First, petitioners contend that, in formally denying Council Tree's reconsideration petition in the *Second Reconsideration Order*, the Commission arbitrarily ignored comments filed (and developments that occurred) after the June 2006 *Reconsideration Order* was issued. Pet. Supp. Br. 12-24. According to petitioners, these comments and developments – including allegedly poor DE success in Auctions 66 and 73 (*see* Pet. Supp. Br. 14-16) – demonstrate that the DE rules adopted in the *Second R&O* and *Reconsideration Order* are unlawful. That claim, however, would be legally relevant only if the Commission had been obligated, in the *Second Reconsideration Order*, to consider developments that occurred after it issued the *Reconsideration Order*. The Commission was not. Although broader issues remain pending in WT Docket 05-211,[18] the Commission

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[18] The Commission has not yet completed action on the "Second Further Notice of Proposed Rulemaking" portion of the *Second R&O* (*see* JA 101-113), or resolved petitions for reconsideration filed by the Blooston Rural Carriers (SJA 31) and Cook Inlet Region, Inc. (SJA 67).

properly limited the focus of the *Second Reconsideration Order* to Council Tree's own request, in its July 2006, Dismissal Letter, that the Commission formally terminate action on its reconsideration petition because it had "already decided the merits of the Petition" (SJA 132) in the June 2006 *Reconsideration Order*. *See Second Reconsideration Order* ¶¶ 3-4 (SJA 30). By formally denying Council Tree's petition on its requested grounds, the Commission allowed Council Tree to return to this Court on its challenges to the underlying *Second R&O* and *Reconsideration Order*. Council Tree cannot plausibly now contend that the Commission acted unreasonably in granting Council Tree's request to terminate that proceeding without addressing subsequent developments.

Seen in this context, petitioners' claim that developments subsequent to the *Reconsideration Order* demonstrate the unlawfulness of the Commission's DE rules is simply an expanded version of petitioners' meritless claim in *Council Tree I* that post-record evidence regarding Auction 66 supported their challenge. *See generally* Pet. Br. 50-54 (Case No. 06-2943). As respondents previously emphasized in response to that argument, however, developments occurring after the pertinent administrative record closed can suggest, at most, that the Commission's "assessment of its new DE rules 'appears *ex post* to have been mistaken,'" while "the only legally relevant inquiry" is "whether 'the Commission's decision was unreasonable *ex ante*.'" Respondents' Br. 47-48 (Case

No. 06-2943) (quoting *Fresno Mobile Radio*, 165 F.3d at 971).[19] Because petitioners' challenge based on subsequent developments is "not a challenge to the reasonableness of the agency's decision on the basis of the record then before it, [their] claim must fail." *Fresno Mobile Radio*, 165 F.3d at 971.

Even if it were permissible to judge the reasonableness of the Commission's DE rules with reference to "*ex post*" DE performance, there would be no merit to petitioners' claims that DE performance in Auctions 66 and 73, compared with DE performance in earlier auctions, demonstrates legal flaws in the Commission's current DE rules. First, as detailed above (at pages 10-12), by any reasonably objective standard DEs did very well in both auctions. Among other things, they comprised 57 of the 104 winning bidders in Auction 66, 56 of the 101 winning bidders in Auction 73, and they won, respectively, 20% and 35% of all the licenses in those auctions. Petitioners seek to disparage these numbers by complaining that DEs tended to win the smaller (and less costly) licenses and that many of the DE winners were rural telephone companies. Pet. Supp. Br. 15-16. But it should come as no surprise that (legitimate) small businesses would focus on small licenses and build from there;[20] and the Commission, accordingly, has employed, not just

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[19] *See also NVE Inc. v. Dept. of Health and Human Servs.*, 436 F.3d 182, 189 (3d Cir. 2006) ("In applying [the arbitrary and capricious] standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973))).

[20] It is nevertheless noteworthy that in both auctions, DEs did not just win small rural licenses. In Auction 66, for example, DE Denali Spectrum License, LLC won a regional license covering over 58 million people in the Great Lakes Area, and DE Barat Wireless, L.P. won a regional license in the Mississippi Valley Area

bidding credits, but a range of geographic licensing areas and spectrum block sizes to promote DE participation.[21] Moreover, "rural telephone companies," no less than other "small businesses," are express statutory beneficiaries of the Communications Act's designated entity provisions. *See* 47 U.S.C. §§ 309(j)(3)(B) & (4)(D).

In addition, as the government explained in *Council Tree I* with respect to petitioners' effectively indistinguishable claims regarding DE performance in Auction 66, meaningful assessments of *relative* DE results across auctions are difficult, if not impossible, to make. *See* Respondents' Br. 44-47 (Case No. 06-2943). We pointed out, in addition, that Council Tree was not well-situated to claim that greater DE success (by some metrics) in auctions conducted prior to adoption of the new DE rules signified flaws in the new rules, given that many of the DE winners in the prior auctions Council Tree cited would not have qualified

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covering over 30 million people. *See Auction 66 Closure Notice*, Attachment A at 54, 55; *see also* http://wireless.fcc.gov/auctions/66/charts/66press_5.pdf, at 26 (last updated 9/18/06). And in Auction 73, various DEs (*e.g.*, King Street Wireless, L.P., Continuum 700 LLC, and Cavalier Wireless, LLC) won licenses covering, among other cities, St. Louis, Milwaukee, Des Moines, Charlotte, Richmond, Jacksonville, Honolulu, Louisville, Buffalo, Syracuse, and Albany. *See generally Auction 73 Closure Notice*, Attachment A.

[21] *See, e.g., Service Rules for Advanced Wireless Services In the 1.7 GHz and 2.1 GHz Bands*, 20 FCC Rcd 14058 (¶¶ 5-21 (2005).

for DE status under the rule revisions Council Tree itself had urged the Commission to adopt. *See* Respondents' Br. 45-46.[22]

Petitioners also take issue with the Commission's statement, in the *Second R&O*, that the leasing/resale-related eligibility restrictions it adopted would advance the statutory goal of ensuring that "'every recipient of our designated entity benefits is an entity that uses its licenses to *directly* provide facilities-based telecommunications services for the benefit of the public.'" Pet. Supp. Br. 19 & n.33 (quoting *Second R&O* ¶ 15 (JA 89) (emphasis supplied by petitioners)). In particular, petitioners contend that "[t]he word 'directly' is neither in the statute nor the legislative history," and that the Commission therefore had no basis for conditioning eligibility for DE benefits on a carrier's commitment to provide most of its service on a retail basis. *Id.* at 19.

This technical statutory claim was never presented to the Commission in the record leading to the *Second R&O* and the *Reconsideration Order* and thus is not

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[22] Petitioners' updated charts and figures comparing DE performance in Auction 73 with DE performance in prior auctions are subject to the same criticism. *See April 15 Martin Statement to Congress*, at 4 & Exhibits 2, 3 (demonstrating that DE performance in both Auctions 66 and 73 was very similar to that in the prior PCS auctions (Auctions 35 and 58) when the results are corrected to exclude from the PCS auction results DEs that *were partnered with nationwide incumbent carriers*), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281580A1.pdf, and http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281580A2.pdf.

properly before the Court.[23] *See* 47 U.S.C. § 405(a) (when seeking judicial review of a Commission order, a party may not raise an issue "upon which the Commission * * * has been afforded no opportunity to pass"); *Service Electric Cable TV, Inc. v. FCC*, 468 F.2d 674, 676-77 (3d Cir. 1972). In any event, however, whether or not the word "directly" is in the statute or its legislative history, it was certainly reasonable for the Commission to find that a carrier that provides a majority of its service at retail most faithfully advances Congress's goal that the recipient of DE benefits is itself "offering service to the public" (H.R. Rep. No. 103-111 at 258 (1993)) – and to tailor its DE rules accordingly.

There also is no merit to petitioners' related contention that the Commission's decision to waive limitations on wholesaling by DEs in connection with one block of spectrum in the 700 MHz auction undermines its statutory analysis. Pet. Supp. Br. 20 (citing *Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission's Rules For the Upper 700 MHz Band D Block License*, 22 FCC Rcd 20354 (2007) ("*Waiver Order*"). Section 309(j) of the Communications Act requires the Commission to balance competing goals as it implements the DE program. *Fresno Mobile Radio*, 165 F.3d at 971; *Melcher v. FCC*, 134 F.3d 1143, 1153-55 (D.C. Cir. 1998). Conducting such a balance, the Commission predicated its limited waiver on "the unique circumstances and obligations of the D Block

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[23] Petitioners cite a filing by Frontline Wireless, LLC as the source of this statutory argument. Pet. Supp. Br. 18 (citing SJA 920). That filing was submitted October 17, 2007 – more than 16 months after the Commission issued the *Reconsideration Order*.

license," which require the licensee to "construct[] and operat[e] a nationwide, interoperable broadband network * * * to provide both a commercial service and a broadband network service to public safety entities." *Waiver Order* ¶¶ 7, 9.[24] In any event, this claim also fails both because it was never presented to the Commission in advance of the *Second R&O* and the *Reconsideration Order*, *see* 47 U.S.C. § 405(a), and because allegedly inconsistent *subsequent* action by any agency cannot form the basis for any challenge to the orders on review. *See Capital Network System, Inc. v. FCC*, 3 F.3d 1526, 1530 (D.C. Cir. 1993) (noting that "the Commission [can] hardly be faulted for ignoring 'precedents' that did not precede") (internal quotations omitted).

Petitioners also contend that it was unreasonable for the Commission to rely on the unjust enrichment/anti-trafficking provisions of section 309(j) to support the

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[24] The Commission explained that the D Block license would be subject to extraordinary regulatory oversight conditions not applicable to other licenses:

> The single nationwide 10-megahertz D Block commercial license will be awarded to a winning bidder only after it enters into a Commission-approved Network Sharing Agreement ("NSA") * * * * Reflecting the importance of the terms of the NSA to the public interest, we provided that the Commission will oversee the negotiation of the NSA, and will play an active role in the resolution of the disputes among the relevant parties * * * * These licensing obligations subject the D Block licensee to unique requirements, including significant Commission oversight and coordination, in order to assure that it participates in the provision of extensive, uninterrupted public safety and commercial service for the benefit of the public.

Waiver Order ¶ 2 (citations omitted).

limitations on eligibility for DE benefits it adopted because those statutory provisions apply to "*all* auction participants – large and small, not just upon DEs." Pet. Supp. Br. 20 & n.35. Like its argument predicated on the word "directly," this statutory claim is not properly before the Court because it was not first presented to the Commission. *See* 47 U.S.C. § 405(a); *Service Electric Cable TV, Inc. v. FCC*, 468 F.2d at 676-77.

The argument also is baseless. The Commission has, in fact, adopted reporting requirements with respect to *all* (DE and non-DE) competitive bidding licensees to protect against trafficking/unjust enrichment abuses. *See* 47 C.F.R. § 1.2111(a); *Implementation of Section 309(j) of the Communications Act*, Second Report and Order, 9 FCC Rcd 2348 (¶ 214) (1994) ("*Competitive Bidding Second R&O*"). Nothing in the statute, however, prevents the Commission from adopting rules that target the circumstances in which the risks of unjust enrichment are greatest. In this regard, both the Commission and Congress recognized that unjust enrichment is a particular concern with respect to auctions in which DEs are provided "special accommodations" (such as set-asides or bidding credits) that allow them to obtain licenses at less than full market value. *Id.* ¶ 211; *accord* H.R. Rep. No. 103-111 at 257 (1993).[25] From the beginning of the auctions program, therefore, the Commission has implemented "specific rules governing unjust

[25] By contrast, a party that is awarded a license without special benefits in an open competitive bidding process is "likely to pay the market price for its license," and subsequent transfer of the license would be unlikely to provide an undeserved windfall. *Competitive Bidding Second R&O* ¶ 212; *accord* H.R. Rep. No. 103-111 at 257.

enrichment by designated entities." *Competitive Bidding Second R&O* ¶ 214. Indeed, in its comments before the Commission, Council Tree expressly acknowledged the agency's authority to adopt "unjust enrichment provisions applicable to those who use competitive bidding *preferences* to acquire Commission licenses." Comments of Council Tree Communications, Inc. at viii (February 24, 2006) (JA 440) (emphasis added). Council Tree may be unhappy with the particular eligibility restrictions and unjust enrichment rules the Commission has adopted, but there is no substance to petitioners' contention that section 309(j) prevents the agency from adopting restrictions that are targeted specifically to designated entities.

In sum, petitioners have not established, either in the prior round of briefing or in their supplemental brief, any legal flaws in the orders on review.

II. Even Were Petitioners To Succeed On The Merits, Vacatur Of The DE Rules And Nullification Of The Results Of AuctionsConducted Under Those Rules Would Not Be Warranted

Even if this Court were to find that there were legal flaws in the Commission's promulgation of its DE rules, neither vacatur of those rules nor nullification of the auctions conducted under them would be warranted. *Compare* Pet. Supp. Br. 24-37. As the government previously explained, absent a demonstration (lacking here) that the Commission lacked statutory authority to adopt the *Second R&O* and the *Reconsideration Order*, remand without vacatur is the appropriate remedy to correct any alleged defects in APA notice or in the adequacy of the Commission's explanation in support of its DE rules. *See*

Respondents' Br. 51-54 (Case No. 06-2943). And in no event is there any warrant for nullification of auctions already conducted.

It is well-established that remand without vacatur is the appropriate remedy with respect to a rulemaking order "when it seems likely that the agency will be able to correct a flaw or gap in its reasoning process on remand" or in the event that the APA notice was lacking but it is "likely that the agency will be able to support the same rule after providing an opportunity for supplemental comments on remand." Richard J. Pierce, Jr., *Administrative Law Treatise* § 7.13, at 521-22 (4th ed. 2002).[26] In determining whether to remand without vacating, courts properly consider "'the seriousness of the * * * deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" *Chamber of Commerce v. SEC*, 443 F.3d 890, 908 (D.C. Cir. 2006) (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)). These principles converge with the public interest considerations that the Court previously applied in declining to stay the effectiveness of the DE rule in its June 2006 *Stay Denial Order*. *See International Union, UMW v. FMSHA*, 920 F.2d 960, 967 (D.C. Cir.

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[26] *See, e.g., American Iron & Steel Institute v. EPA*, 568 F.2d 284, 310 (3d Cir. 1977) (remanding without vacating EPA regulations that were inadequately noticed and explained); *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991) (remanding without vacating rules despite the "fail[ure] to provide adequate notice and comment" because, "when equity demands, an unlawfully promulgated regulation can be left in place while the agency provides the proper procedural remedy"); *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (remanding without vacating after inadequate APA notice); *Western Oil and Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980) (same).

1990). Because petitioners have provided no basis on which to conclude that the Commission would be unable to readopt the same DE rules in subsequent administrative proceedings after providing further notice or explanation, the Court should decline petitioners' invitation to vacate those rules even if it were to find merit in their APA challenges.

There is even less force to petitioners' request that the Court nullify Auctions 66 and 73. As discussed above (at 10-11), Auction 66 was long ago completed, the licenses won in that auction have been granted, and licensees are actively rolling out service pursuant to those licenses. It is well established that the subsequent invalidation of administrative rules can have no retroactive effect on prior applications of those rules that have become final. *See Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993) (courts may apply a new rule only to cases "still open on direct review"); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991) (courts apply their rulings with respect to litigants and claims "not barred by procedural requirements or res judicata"). As the Commission has recognized, this principle controls in the auction context. *See Weblink Wireless, Inc.*, 16 FCC Rcd 9420 (¶ 8) (WTB 2001) (holding that subsequent invalidation of bidder preferences provided no basis to nullify results of a closed auction); *Community Teleplay, Inc.*, 13 FCC Rcd 12426 (WTB 1998) (same).

As pertinent here, although petitioners purport to challenge Auction 66 directly by including the May 19, 2006 *Auction Public Notice* among the agency actions for which they now seek review (*see* Pet. for Review at 2-3 (Case No. 08-

2036)), that attempt is ineffective. The *Auction Public Notice* was not issued in the DE rulemaking docket (05-211) and therefore was not rendered non-final (and thus subject to later challenge) by petitioners' petition for reconsideration of the *Second R&O*. *See West Penn Power Co.*, 860 F.2d at 587. The 60-day statutory window for seeking review of that public notice under 47 U.S.C. § 2344 thus closed nearly two years before petitioners filed their current petition for review in April 2008. *See CTIA v. FCC*, 330 F.3d 502, 504 (D.C. Cir. 2003) ("A petition for judicial review to challenge a final order of the Commission must be filed 'within 60 days after its entry.'") (quoting § 2344).

Petitioners' attempt to have this Court nullify Auction 73 fares no better. Quite apart from the compelling equitable and public policy reasons – discussed below – against unwinding that auction (or Auction 66), petitioners' request for nullification of Auction 73 fails at the threshold, because petitioners did not identify any order related to that auction in its petition for review in this case. Rule 15(a)(2)(C), Fed. R. App. P. – the requirements of which are "jurisdictional"[27] – states that a "petition must * * * specify the order or part thereof to be reviewed." Because petitioners' challenge to Auction 73 does not comply with this requirement of Rule 15(a), the Court lacks jurisdiction to consider it.

Moreover, petitioners' challenge to Auction 73 also improperly asks this Court to intrude on the jurisdiction of a sister circuit. As previously discussed (at 12-13), petitioners sought direct review of the conduct of that auction in this Court

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[27] *Wisniewski v. Dir., Office of Workers' Compensation Programs,* 929 F.2d 952, 954 (3d Cir. 1991).

(No. 07-4119) by filing a separate petition for review of the *700 MHz Service Rules Order*, but this Court transferred that case to the D.C. Circuit and the record has been filed there pursuant to 28 U.S.C. § 2112(a)(1). Under the Hobbs Act, the D.C. Circuit now has exclusive jurisdiction over that order and this Court should not countenance petitioners' attempt to attack Auction 73 collaterally here. *See* 28 U.S.C. § 2349(a) ("The court of appeals in which the record on review is filed * * * has *exclusive jurisdiction* to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.") (emphasis added).

Finally, even if Auctions 66 or 73 were properly before the Court in this review proceeding, the remedy of nullifying those auctions would be improper given the wide-ranging adverse impact such action would have on the public and private interests at stake. With respect to Auction 66, this Court previously stressed in the *Stay Denial Order* (at 6) that:

> this auction represents the culmination of an 18-month process of [preparing for the relocation of] government users from the [pertinent] spectrum * * * and will advance the public interest by helping to modernize the nation's broadband infrastructure, which lags dramatically behind other industrialized nations.

The proceeds of that auction have now been collected and are being distributed to assist in that relocation of spectrum users. *See* pages 10-11, above. Moreover, licensees have invested heavily and, in many areas, are already actively providing needed service to the public pursuant to those licenses. *See* n.13, above;

Supp. Br. of Intervenors CTIA and T-Mobile USA, Inc. at 4-7, 21-25 (filed Sept. 15, 2008). Nullification would scuttle the public and private benefits generated by all of these efforts, contrary even to the interests of many members of the DE community for whom petitioners purport to speak. *See generally* Amicus Brief American Cellular Corp., *et al.* (Case No. 06-2943) (documenting irreparable harm that nullification would have on Auction 66 DE winners).

Nullification of Auction 73 would harm compelling public and private interests in a similar manner. Congress ordered the Commission to begin that auction no later than January 28, 2008, and to deposit the auction proceeds in the U.S. Treasury by June 30, 2008, in order to promote public safety and to assist in the scheduled February 2009 transition from analog to digital broadcasting. *See 700 MHz Service Rules Order* ¶ 15. Those proceeds have now been deposited,[28] and are being applied to implement programs to support the distribution of digital converter boxes needed to adapt existing analog television sets to digital broadcast transmissions,[29] as well as public safety programs, including a New York City 9/11 digital transition program.[30] The auction raised nearly $19 billion in winning bids

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[28] *See TR Daily* (July 7, 2008) (reporting that "[t]he FCC met a June 30 [2008] statutory deadline for ensuring proceeds from the 700 megahertz band auction were deposited into the U.S. Treasury"), available at: http://www.tr.com/online/trd/2008/td070708/index.com.htm.

[29] DTV Act § 3005.

[30] DTV Act § 3007; *see also id.* §§ 3006 & 3010 (authorizing programs to support public safety interoperable grants and a National Alert and Tsunami Warning System).

in furtherance of these Congressional objectives while producing a broad array of DE and non-DE winners. *See* pages 11-12, above. Unwinding the auction now would cause tremendous upheaval given the financial stakes involved and would subvert the auction timetable Congress established.

In contrast with the significant and concrete harms that necessarily would flow from vacating Auctions 66 and 73, the allegedly offsetting equities petitioners invoke are entirely speculative or are otherwise meritless. Petitioners self-servingly suggest, for instance, that they "are not responsible for any of the 'disruption'" that would result from nullifying Auctions 66 or 73. Pet. Supp. Br. 31. But the disruptive effect of nullification grows as time passes, and responsibility for the delay in obtaining judicial review on the merits of the DE rules rests squarely with petitioners themselves. In *Council Tree I*, this Court held that petitioners' petition to review the *Reconsideration Order* was premature because *petitioners* filed it prior to Federal Register publication of that order. 503 F.3d at 287-88. And the Court concluded that there was "no excuse for [that] prematurity." *See id.* at 291-93.

Similarly baseless is petitioners' claim that the DE rules depressed the proceeds the government received from Auctions 66 and 73, and played a role in the failure to receive a qualifying minimum bid for the Auction 73 D Block license. Pet. Supp. Br. 28, 31. In fact, Auctions 66 and 73 were the most lucrative in the history of the auctions program – generating, respectively, more than $13.7 billion and nearly $19 billion in winning bids (net of bidding credits). *See* pages, 10-12, above. And emphatically dispelling petitioners' claim that the DE rules

deterred bidding, the winning bid total in Auction 73 nearly doubled pre-auction Congressional estimates. *March 18 Martin Statement* at 1. Petitioners, moreover, offer no evidence linking the DE rules – which were waived in part for the D Block license, in any event (*see Waiver Order* ¶ 11) – to the failure of bidders to meet the applicable reserve price. By contrast, the Commission's Inspector General, at Chairman Martin's request, conducted an investigation into the reasons for D Block failure in Auction 73 and determined that a number of factors specific to the design of the D Block license created "uncertainties and risks" that deterred bidding.[31] The DE rules were not among the cited factors.

Finally, there is little substance to petitioners' claimed harms to their own business operations from the DE rules. Council Tree cannot prove that it would have won any licenses in Auctions 66 or 73 under any set of rules, either the ones now in effect, the ones Council Tree would have preferred, or the ones the Commission previously employed. It can only imagine that it might have won, while the only reality is that it did not participate.

Council Tree asserts that the Commission's DE rules denied it "the opportunity to build a business projected to create $26 billion in shareholder value over a ten-year time frame," and denied the public the benefits of competition from "a new national entrant." Pet. Supp. Br. 29-30. However, this alleged injury appears to have been created out of whole cloth and finds no support in the

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[31] *Office of Inspector General Report, D Block Investigation*, at 2, 21-26 (April 25, 2008), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281791A1.pdf.

administrative record or any other cited source. Indeed, in the stay petition materials petitioners cite in support of their "new national carrier" plan, they actually told the Commission that they intended to implement a modest business plan focused on serving "remote, truly underserved, villages in Alaska, such as those around Bethel,"[32] with no reference to specific shareholder value figures. Whatever harms that may have resulted from the demise of petitioners' alleged business plan cannot compare with the very real injuries that the government, other wireless carriers, and consumers necessarily would suffer if the auctions were overturned.[33]

In these circumstances, we respectfully submit that, to the extent that Auctions 66 and 73 are before the Court at all, the Court should leave to the agency, in the first instance, the task of fashioning an appropriate remedy in the event the Court finds that APA violations have occurred. Such a course is well within the Court's authority. *See, e.g., City of Brookings Municipal Telephone Co.*

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[32] Declaration of Steve C. Hillard, Council Tree Communications, Inc. at ¶ 5 (JA 1537). *See also* Declaration of Anastasia C. Hoffman, Bethel Native Corporation, at ¶¶ 7-8 (JA 1533-34) (stating that petitioner Bethel Native Corporation hoped to participate in providing service to under-served Alaskan communities).

[33] Petitioners note that winning bidders have been notified by the Commission, as a matter of course, that "'pending and future judicial proceedings * * * may relate to particular applicants or incumbent licensees, or the licensees available * * *,'" Pet. Supp. Br. 34 (citation omitted), but the bare existence of that notice does not permit the tremendous disruption that petitioners' remedy would cause to be ignored. Moreover, as noted, the public is already using the AWS spectrum in some markets (and will imminently be doing so in many others, *see* pages 10-11, 29-30). Members of the public are not on "notice" of Council Tree's litigation, and no remedy should come at their expense.

v. FCC, 822 F.2d 1153, 1171-72 (D.C. Cir. 1987) (declining to order reassessment of settlement payments made under improperly adopted rules and instead leaving it to the Commission to determine "how best to accommodate [the relevant] interests" where a court ordered reassessment of payments "would disrupt the settlement process and would, among other things, cause economic hardship to many companies that are not parties to the petition for review").

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)(B)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8884 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii).

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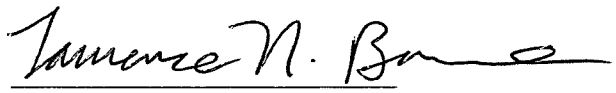

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I also certify that ten bound copies of the foregoing Supplemental Brief of Intervenors CTIA – The Wireless Association® and T-Mobile USA, Inc. in Support of Respondents were filed in the manner indicated below:

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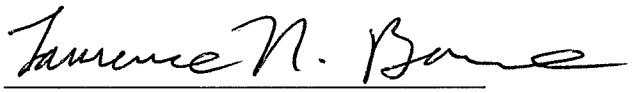

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STATUTORY ADDENDUM

28 U.S.C. § 2112

28 U.S.C. § 2349(a)

47 U.S.C. § 405

The Digital Television Transition and Public Safety Act, Title III of Pub. L. 109-171

28 U.S.C.A. § 2112

UNITED STATES CODE
TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE
PART V—PROCEDURE
CHAPTER 133—REVIEW: MISCELLANEOUS PROVISIONS

§ 2112. Record on review and enforcement of agency orders

(a) The rules prescribed under the authority of section 2072 of this title may provide for the time and manner of filing and the contents of the record in all proceedings instituted in the courts of appeals to enjoin, set aside, suspend, modify, or otherwise review or enforce orders of administrative agencies, boards, commissions, and officers. Such rules may authorize the agency, board, commission, or officer to file in the court a certified list of the materials comprising the record and retain and hold for the court all such materials and transmit the same or any part thereof to the court, when and as required by it, at any time prior to the final determination of the proceeding, and such filing of such certified list of the materials comprising the record and such subsequent transmittal of any such materials when and as required shall be deemed full compliance with any provision of law requiring the filing of the record in the court. The record in such proceedings shall be certified and filed in or held for and transmitted to the court of appeals by the agency, board, commission, or officer concerned within the time and in the manner prescribed by such rules. If proceedings are instituted in two or more courts of appeals with respect to the same order, the following shall apply:

(1) If within ten days after issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in at least two courts of appeals, the agency, board, commission, or officer shall proceed in accordance with paragraph (3) of this subsection. If within ten days after the issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in only one court of appeals, the agency, board, commission, or officer shall file the record in that court notwithstanding the institution in any other court of appeals of proceedings for review of that order. In all other cases in which proceedings have been instituted in two or more courts of appeals with respect to the same order, the agency, board, commission, or officer concerned shall file the record in the court in which proceedings with respect to the order were first instituted.

(2) For purposes of paragraph (1) of this subsection, a copy of the petition or other pleading which institutes proceedings in a court of appeals and which is stamped by the court with the date of filing shall constitute the petition for review. Each agency, board, commission, or officer, as the case may be, shall designate by rule the office and the officer who must receive petitions for review under paragraph (1).

(3) If an agency, board, commission, or officer receives two or more petitions for review of an order in accordance with the first sentence of paragraph (1) of this subsection, the agency, board, commission, or officer shall, promptly after the expiration of the ten-day period specified in that sentence, so notify the judicial panel on multidistrict litigation authorized by section 1407 of this title, in such form as that panel shall prescribe. The

judicial panel on multidistrict litigation shall, by means of random selection, designate one court of appeals, from among the courts of appeals in which petitions for review have been filed and received within the ten-day period specified in the first sentence of paragraph (1), in which the record is to be filed, and shall issue an order consolidating the petitions for review in that court of appeals. The judicial panel on multidistrict litigation shall, after providing notice to the public and an opportunity for the submission of comments, prescribe rules with respect to the consolidation of proceedings under this paragraph. The agency, board, commission, or officer concerned shall file the record in the court of appeals designated pursuant to this paragraph.

(4) Any court of appeals in which proceedings with respect to an order of an agency, board, commission, or officer have been instituted may, to the extent authorized by law, stay the effective date of the order. Any such stay may thereafter be modified, revoked, or extended by a court of appeals designated pursuant to paragraph (3) with respect to that order or by any other court of appeals to which the proceedings are transferred.

(5) All courts in which proceedings are instituted with respect to the same order, other than the court in which the record is filed pursuant to this subsection, shall transfer those proceedings to the court in which the record is so filed. For the convenience of the parties in the interest of justice, the court in which the record is filed may thereafter transfer all the proceedings with respect to that order to any other court of appeals.

(b) The record to be filed in the court of appeals in such a proceeding shall consist of the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency, board, commission, or officer concerned, or such portions thereof (1) as the rules prescribed under the authority of section 2072 of this title may require to be included therein, or (2) as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written stipulation filed with the agency, board, commission, or officer concerned or in the court in any such proceeding may consistently with the rules prescribed under the authority of section 2072 of this title designate to be included therein, or (3) as the court upon motion of a party or, after a prehearing conference, upon its own motion may by order in any such proceeding designate to be included therein. Such a stipulation or order may provide in an appropriate case that no record need be filed in the court of appeals. If, however, the correctness of a finding of fact by the agency, board, commission, or officer is in question all of the evidence before the agency, board, commission, or officer shall be included in the record except such as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written stipulation filed with the agency, board, commission, or officer concerned or in the court agree to omit as wholly immaterial to the questioned finding. If there is omitted from the record any portion of the proceedings before the agency, board, commission, or officer which the court subsequently determines to be proper for it to consider to enable it to review or enforce the order in question the court may direct that such additional portion of the proceedings be filed as a supplement to the record. The agency, board, commission, or officer concerned may, at its option and without regard to the foregoing provisions of this subsection, and if so requested by the petitioner for review or respondent in enforcement shall, file in the court the entire record of the proceedings before it without abbreviation.

(c) The agency, board, commission, or officer concerned may transmit to the court of appeals the original papers comprising the whole or any part of the record or any supplemental record, otherwise true copies of such papers certified by an authorized officer or deputy of the agency, board, commission, or officer concerned shall be transmitted. Any original papers thus transmitted to the court of appeals shall be returned to the agency, board, commission, or officer concerned upon the final determination of the review or enforcement proceeding. Pending such final determination any such papers may be returned by the court temporarily to the custody of the agency, board, commission, or officer concerned if needed for the transaction of the public business. Certified copies of any papers included in the record or any supplemental record may also be returned to the agency, board, commission, or officer concerned upon the final determination of review or enforcement proceedings.

(d) The provisions of this section are not applicable to proceedings to review decisions of the Tax Court of the United States or to proceedings to review or enforce those orders of administrative agencies, boards, commissions, or officers which are by law reviewable or enforceable by the district courts.

28 U.S.C.A. § 2349(a)

UNITED STATES CODE
TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE
PART VI—PARTICULAR PROCEEDINGS
CHAPTER 158—ORDERS OF FEDERAL AGENCIES; REVIEW

§ 2349. Jurisdiction of the proceeding

(a) The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals in which the record on review is filed, on the filing, has jurisdiction to vacate stay orders or interlocutory injunctions previously granted by any court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

47 U.S.C.A. § 405

UNITED STATES CODE
TITLE 47—TELEGRAPHS, TELEPHONES, and RADIOTELEGRAPHS
CHAPTER 5—WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV—PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

UNITED STATES PUBLIC LAWS
109th Congress - Second Session
Convening January 7, 2005

Additions and Deletions are not identified in this database.
Vetoed provisions within tabular material are not displayed

PL 109-171 (S 1932)
February 8, 2006
DEFICIT REDUCTION ACT OF 2005

An Act To provide for reconciliation pursuant to section 202(a) of the concurrent resolution on the budget for fiscal year 2006 (H. Con. Res. 95).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

<< 42 USCA § 1305 NOTE >>

SECTION 1. SHORT TITLE.

This Act may be cited as the "Deficit Reduction Act of 2005".

SEC. 2. TABLE OF TITLES.

The table of titles is as follows:

TITLE I--AGRICULTURE PROVISIONS SECTION
<< 7 USCA § 7901 NOTE >>

SEC.1001. SHORT TITLE.

that such regulations may refer to "Bank Insurance Fund members" or "Savings Association Insurance Fund members".

TITLE III--DIGITAL TELEVISION TRANSITION AND PUBLIC SAFETY
<< 47 USCA § 309 NOTE >>

SEC. 3001. SHORT TITLE; DEFINITION.

(a) SHORT TITLE.--This title may be cited as the "Digital Television Transition and Public Safety Act of 2005".

(b) DEFINITION.--As used in this Act, the term "Assistant Secretary" means the Assistant Secretary for Communications and Information of the Department of Commerce.

<< 47 USCA § 309 NOTE >>

SEC. 3002. ANALOG SPECTRUM RECOVERY: FIRM DEADLINE.

(a) AMENDMENTS.--Section 309(j)(14) of the Communications Act of 1934 (47 U.S.C. 309(j)(14)) is amended--

<< 47 USCA § 309 >>

(1) in subparagraph (A)--

(A) by inserting "full-power" before "television broadcast license"; and

(B) by striking "December 31, 2006" and inserting "February 17, 2009";

<< 47 USCA § 309 >>

(2) by striking subparagraph (B);

<< 47 USCA § 309 >>

(3) in subparagraph (C)(i)(I), by striking "or (B)";

<< 47 USCA § 309 >>

(4) in subparagraph (D), by striking "subparagraph (C)(i)" and inserting "subparagraph (B)(i)"; and

<< 47 USCA § 309 >>

(5) by redesignating subparagraphs (C) and (D) as subparagraphs (B) and (C), respectively.

(b) TERMINATIONS OF ANALOG LICENSES AND BROADCASTING.--The Federal Communications Commission shall take such actions as are necessary--

(1) to terminate all licenses for full-power television stations in the analog television service, and to require the cessation of broadcasting by full-power stations in the analog television service, by February 18, 2009; and

(2) to require by February 18, 2009, that all broadcasting by Class A stations, whether in the analog television service or digital television service, and all broadcasting by full-power stations in the digital television service, occur only on channels between channels 2 and 36, inclusive, or 38 and 51, inclusive (between frequencies 54 and 698 megahertz, inclusive).

(c) CONFORMING AMENDMENTS.--

(1) Section 337(e) of the Communications Act of 1934 (47 U.S.C. 337(e)) is amended--

<< 47 USCA § 337 >>

(A) in paragraph (1)--

(i) by striking "CHANNELS 60 TO 69" and inserting "CHANNELS 52 TO 69";

(ii) by striking "person who" and inserting "full-power television station licensee that";

(iii) by striking "746 and 806 megahertz" and inserting "698 and 806 megahertz"; and

*22
(iv) by striking "the date on which the digital television service transition period terminates, as determined by the Commission" and inserting "February 17, 2009";

<< 47 USCA § 337 >>

(B) in paragraph (2), by striking "746 megahertz" and inserting "698 megahertz".

<< 47 USCA § 309 NOTE >>

SEC. 3003. AUCTION OF RECOVERED SPECTRUM.

(a) DEADLINE FOR AUCTION.--Section 309(j) of the Communications Act of 1934 (47 U.S.C. 309(j)) is amended--

<< 47 USCA § 309 >>

(1) by redesignating the second paragraph (15) of such section (as added by section 203(b) of the Commercial Spectrum Enhancement Act (Public Law 108- 494; 118 Stat. 3993)), as paragraph (16) of such section; and

<< 47 USCA § 309 >>

(2) in the first paragraph (15) of such section (as added by section 3(a) of the Auction Reform Act of 2002 (Public Law 107-195; 116 Stat. 716)), by adding at the end of subparagraph (C) the following new clauses:

"(v) ADDITIONAL DEADLINES FOR RECOVERED ANALOG SPECTRUM.--Notwithstanding subpara-

graph (B), the Commission shall conduct the auction of the licenses for recovered analog spectrum by commencing the bidding not later than January 28, 2008, and shall deposit the proceeds of such auction in accordance with paragraph (8)(E)(ii) not later than June 30, 2008.

"(vi) RECOVERED ANALOG SPECTRUM.--For purposes of clause (v), the term 'recovered analog spectrum' means the spectrum between channels 52 and 69, inclusive (between frequencies 698 and 806 megahertz, inclusive) reclaimed from analog television service broadcasting under paragraph (14), other than--

"(I) the spectrum required by section 337 to be made available for public safety services; and

"(II) the spectrum auctioned prior to the date of enactment of the Digital Television Transition and Public Safety Act of 2005.".

<< 47 USCA § 309 >>

(b) EXTENSION OF AUCTION AUTHORITY.--Section 309(j)(11) of such Act (47 U.S.C. 309(j)(11)) is amended by striking "2007" and inserting "2011".

<< 47 USCA § 309 NOTE >>

SEC. 3004. RESERVATION OF AUCTION PROCEEDS.

Section 309(j)(8) of the Communications Act of 1934 (47 U.S.C. 309(j)(8)) is amended--

<< 47 USCA § 309 >>

(1) in subparagraph (A), by striking "subparagraph (B) or subparagraph (D)" and inserting "subparagraphs (B), (D), and (E)";

<< 47 USCA § 309 >>

(2) in subparagraph (C)(i), by inserting before the semicolon at the end the following: ", except as otherwise provided in subparagraph (E)(ii)"; and

<< 47 USCA § 309 >>

(3) by adding at the end the following new subparagraph:

"(E) TRANSFER OF RECEIPTS.--

"(i) ESTABLISHMENT OF FUND.--There is established in the Treasury of the United States a fund to be known as the Digital Television Transition and Public Safety Fund.

"(ii) PROCEEDS FOR FUNDS.--Notwithstanding subparagraph (A), the proceeds (including deposits and upfront payments from successful bidders) from the ***23** use of a competitive bidding system under this subsection with respect to recovered analog spectrum shall be deposited in the Digital Television Transition and Public Safety Fund.

"(iii) TRANSFER OF AMOUNT TO TREASURY.--On September 30, 2009, the Secretary shall transfer $7,363,000,000 from the Digital Television Transition and Public Safety Fund to the general fund of the Treas- ury.

"(iv) RECOVERED ANALOG SPECTRUM.--For purposes of clause (i), the term 'recovered analog spectrum' has the meaning provided in paragraph (15)(C)(vi).".

<< 47 USCA § 309 NOTE >>

SEC. 3005. DIGITAL-TO-ANALOG CONVERTER BOX PROGRAM.

(a) CREATION OF PROGRAM.--The Assistant Secretary shall--

(1) implement and administer a program through which households in the United States may obtain coupons that can be applied toward the purchase of digital-to-analog converter boxes; and

(2) make payments of not to exceed $990,000,000, in the aggregate, through fiscal year 2009 to carry out that program from the Digital Television Transition and Public Safety Fund established under section 309(j)(8)(E) of the Communications Act of 1934 (47 U.S.C. 309(j)(8)(E)).

(b) CREDIT.--The Assistant Secretary may borrow from the Treasury beginning on October 1, 2006, such sums as may be necessary, but not to exceed $1,500,000,000, to implement this section. The Assistant Secretary shall reimburse the Treasury, without interest, as funds are deposited into the Digital Television Transition and Public Safety Fund.

(c) PROGRAM SPECIFICATIONS.--

(1) LIMITATIONS.--

(A) TWO-PER-HOUSEHOLD MAXIMUM.--A household may obtain coupons by making a request as required by the regulations under this section between January 1, 2008, and March 31, 2009, inclusive. The Assistant Secretary shall ensure that each requesting household receives, via the United States Postal Service, no more than two coupons.

(B) NO COMBINATIONS OF COUPONS.--Two coupons may not be used in combination toward the purchase of a single digital-to-analog converter box.

(C) DURATION.--All coupons shall expire 3 months after issuance.

(2) DISTRIBUTION OF COUPONS.--The Assistant Secretary shall expend not more than $100,000,000 on administrative expenses and shall ensure that the sum of--

(A) all administrative expenses for the program, including not more than $5,000,000 for consumer education concerning the digital television transition and the availability of the digital-to-analog converter box pro- gram; and

(B) the total maximum value of all the coupons redeemed, and issued but not expired, does not exceed $990,000,000.

(3) USE OF ADDITIONAL AMOUNT.--If the Assistant Secretary transmits to the Committee on Energy and Commerce of the House of Representatives and Committee on Commerce, ***24** Science, and Transportation of the Senate a statement certifying that the sum permitted to be expended under paragraph (2) will be insufficient to fulfill the requests for coupons from eligible households--

(A) paragraph (2) shall be applied--

(i) by substituting "$160,000,000" for "$100,000,000"; and

(ii) by substituting "$1,500,000,000" for "$990,000,000";

(B) subsection (a)(2) shall be applied by substituting "$1,500,000,000" for "$990,000,000"; and

(C) the additional amount permitted to be expended shall be available 60 days after the Assistant Secretary sends such statement.

(4) COUPON VALUE.--The value of each coupon shall be $40.

(d) DEFINITION OF DIGITAL-TO-ANALOG CONVERTER BOX.--For purposes of this section, the term "digital-to-analog converter box" means a stand-alone device that does not contain features or functions except those necessary to enable a consumer to convert any channel broadcast in the digital television service into a format that the consumer can display on television receivers designed to receive and display signals only in the analog television service, but may also include a remote control device.

SEC. 3006. PUBLIC SAFETY INTEROPERABLE COMMUNICATIONS.

<< 47 USCA § 309 NOTE >>

(a) CREATION OF PROGRAM.--The Assistant Secretary, in consultation with the Secretary of the Department of Homeland Security--

(1) may take such administrative action as is necessary to establish and implement a grant program to assist public safety agencies in the acquisition of, deployment of, or training for the use of interoperable communications systems that utilize, or enable interoperability with communications systems that can utilize, reallocated public safety spectrum for radio communication; and

(2) shall make payments of not to exceed $1,000,000,000, in the aggregate, through fiscal year 2010 to carry out that program from the Digital Television Transition and Public Safety Fund established under section 309(j)(8)(E) of the Communications Act of 1934 (47 U.S.C. 309(j)(8)(E)).

(b) CREDIT.--The Assistant Secretary may borrow from the Treasury beginning on October 1, 2006, such sums as may be necessary, but not to exceed $1,000,000,000, to implement this section. The Assistant Secretary shall reimburse the Treasury, without interest, as funds are deposited into the Digital Television Transition and Public Safety Fund.

(c) CONDITION OF GRANTS.--In order to obtain a grant under the grant program, a public safety agency shall agree to provide, from non-Federal sources, not less than 20 percent of the costs of acquiring and deploying the interoperable communications systems funded under the grant program.

(d) DEFINITIONS.--For purposes of this section:

(1) PUBLIC SAFETY AGENCY.--The term "public safety agency" means any State, local, or tribal government entity, or nongovernmental organization authorized by such entity, ***25** whose sole or principal purpose is to protect the safety of life, health, or property.

(2) INTEROPERABLE COMMUNICATIONS SYSTEMS.--The term "interoperable communications systems" means communications systems which enable public safety agencies to share information amongst local, State, Federal, and tribal public safety agencies in the same area via voice or data signals.

(3) REALLOCATED PUBLIC SAFETY SPECTRUM.--The term "reallocated public safety spectrum" means the bands of spectrum located at 764-776 megahertz and 794-806 megahertz, inclusive.

<< 47 USCA § 309 NOTE >>

SEC. 3007. NYC 9/11 DIGITAL TRANSITION.

(a) FUNDS AVAILABLE.--From the Digital Television Transition and Public Safety Fund established under section 309(j)(8)(E) of the Communications Act of 1934 (47 U.S.C. 309(j)(8)(E)) the Assistant Secretary shall make payments of not to exceed $30,000,000, in the aggregate, which shall be available to carry out this section for fiscal years 2007 through 2008. The Assistant Secretary may borrow from the Treasury beginning October 1, 2006, such sums as may be necessary not to exceed $30,000,000 to implement and administer the program in accordance with this section. The Assistant Secretary shall reimburse the Treasury, without interest, as funds are deposited into the Digital Television Transition and Public Safety Fund.

(b) USE OF FUNDS.--The sums available under subsection (a) shall be made available by the Assistant Secretary by grant to be used to reimburse the Metropolitan Television Alliance for costs incurred in the design and deployment of a temporary digital television broadcast system to ensure that, until a permanent facility atop the Freedom Tower is constructed, the members of the Metropolitan Television Alliance can provide the New York City area with an adequate digital television signal as determined by the Federal Communications Commission.

(c) DEFINITIONS.--For purposes of this section:

(1) METROPOLITAN TELEVISION ALLIANCE.--The term "Metropolitan Television Alliance" means the organization formed by New York City television broadcast station licensees to locate new shared facilities as a result of the attacks on September 11, 2001 and the loss of use of shared facilities that housed broadcast equipment.

(2) NEW YORK CITY AREA.--The term "New York City area" means the five counties comprising New York City and counties of northern New Jersey in immediate proximity to New York City (Bergen, Essex, Union, and Hudson Counties).

<< 47 USCA § 309 NOTE >>

SEC. 3008. LOW-POWER TELEVISION AND TRANSLATOR DIGITAL-TO-ANALOG CONVERSION.

(a) CREATION OF PROGRAM.--The Assistant Secretary shall make payments of not to exceed $10,000,000, in the aggregate, during the fiscal year 2008 and 2009 period from the Digital Television Transition and Public

Safety Fund established under section 309(j)(8)(E) of the Communications Act of 1934 (47 U.S.C. 309(j)(8)(E)) to implement and administer a program through which each eligible low-power television station may receive compensation toward the cost of the purchase of a digital-to-analog conversion device that enables it to convert the incoming digital signal of its corresponding full-power television station to analog format for ***26** transmission on the low-power television station's analog channel. An eligible low-power television station may receive such compensation only if it submits a request for such compensation on or before February 17, 2009. Priority compensation shall be given to eligible low-power television stations in which the license is held by a non-profit corporation and eligible low-power television stations that serve rural areas of fewer than 10,000 viewers.

(b) CREDIT.--The Assistant Secretary may borrow from the Treasury beginning October 1, 2006, such sums as may be necessary, but not to exceed $10,000,000, to implement this section. The Assistant Secretary shall reimburse the Treasury, without interest, as funds are deposited into the Digital Television Transition and Public Safety Fund.

(c) ELIGIBLE STATIONS.--For purposes of this section, the term "eligible low-power television station" means a low-power television broadcast station, Class A television station, television translator station, or television booster station--

(1) that is itself broadcasting exclusively in analog format; and

(2) that has not purchased a digital-to-analog conversion device prior to the date of enactment of the Digital Television Transition and Public Safety Act of 2005.

<< 47 USCA § 309 NOTE >>

SEC. 3009. LOW-POWER TELEVISION AND TRANSLATOR UPGRADE PROGRAM.

(a) ESTABLISHMENT.--The Assistant Secretary shall make payments of not to exceed $65,000,000, in the aggregate, during fiscal year 2009 from the Digital Television Transition and Public Safety Fund established under section 309(j)(8)(E) of the Communications Act of 1934 (47 U.S.C. 309(j)(8)(E)) to implement and administer a program through which each licensee of an eligible low-power television station may receive reimbursement for equipment to upgrade low-power television stations from analog to digital in eligible rural communities, as that term is defined in section 610(b)(2) of the Rural Electrification Act of 1937 (7 U.S.C. 950bb(b)(2)). Such reimbursements shall be issued to eligible stations no earlier than October 1, 2010. Priority reimbursements shall be given to eligible low-power television stations in which the license is held by a non-profit corporation and eligible low-power television stations that serve rural areas of fewer than 10,000 viewers.

(b) ELIGIBLE STATIONS.--For purposes of this section, the term "eligible low-power television station" means a low-power television broadcast station, Class A television station, television translator station, or television booster station--

(1) that is itself broadcasting exclusively in analog format; and

(2) that has not converted from analog to digital operations prior to the date of enactment of the Digital Television Transition and Public Safety Act of 2005.

<< 47 USCA § 309 NOTE >>

SEC. 3010. NATIONAL ALERT AND TSUNAMI WARNING PROGRAM.

The Assistant Secretary shall make payments of not to exceed $156,000,000, in the aggregate, during the fiscal year 2007 through 2012 period from the Digital Television Transition and Public Safety Fund established under section 309(j)(8)(E) of the Communications Act of 1934 (47 U.S.C. 309(j)(8)(E)) to implement a unified national alert system capable of alerting the public, on a national, regional, *27 or local basis to emergency situations by using a variety of communications technologies. The Assistant Secretary shall use $50,000,000 of such amounts to implement a tsunami warning and coastal vulnerability program.

<< 47 USCA § 309 NOTE >>

SEC. 3011. ENHANCE 911.

The Assistant Secretary shall make payments of not to exceed $43,500,000, in the aggregate, from the Digital Television Transition and Public Safety Fund established under section 309(j)(8)(E) of the Communications Act of 1934 (47 U.S.C. 309(j)(8)(E)) to implement the ENHANCE 911 Act of 2004.

<< 47 USCA § 309 NOTE >>

SEC. 3012. ESSENTIAL AIR SERVICE PROGRAM.

(a) IN GENERAL.--If the amount appropriated to carry out the essential air service program under subchapter II of chapter 417 of title 49, United States Code, equals or exceeds $110,000,000 for fiscal year 2007 or 2008, then the Secretary of Commerce shall make $15,000,000 available, from the Digital Television Transition and Public Safety Fund established by section 309(j)(8)(E) of the Communications Act of 1934 (47 U.S.C. 309(j)(8)(E)), to the Secretary of Transportation for use in carrying out the essential air service program for that fiscal year.

(b) APPLICATION WITH OTHER FUNDS.--Amounts made available under subsection (a) for any fiscal year shall be in addition to any amounts--

(1) appropriated for that fiscal year; or

(2) derived from fees collected pursuant to section 45301(a)(1) of title 49, United States Code, that are made available for obligation and expenditure to carry out the essential air service program for that fiscal year.

(c) ADVANCES.--The Secretary of Transportation may borrow from the Treasury such sums as may be necessary, but not to exceed $30,000,000 on a temporary and reimbursable basis to implement subsection (a). The Secretary of Transportation shall reimburse the Treasury, without interest, as funds are deposited into the Digital Television Transition and Public Safety Fund under section 309(j)(8)(E) of the Communications Act of 1934 (47 U.S.C. 309(j)(8)(E)) and made available to the Secretary under subsection (a).

<< 47 USCA § 309 NOTE >>

SEC. 3013. SUPPLEMENTAL LICENSE FEES.

In addition to any fees assessed under the Communications Act of 1934 (47 U.S.C. 151 et seq.), the Federal Communications Commission shall assess extraordinary fees for licenses in the aggregate amount of

$10,000,000, which shall be deposited in the Treasury during fiscal year 2006 as offsetting receipts.

TITLE IV--TRANSPORTATION PROVISIONS

SEC. 4001. EXTENSION OF VESSEL TONNAGE DUTIES.

<< 46 App. USCA § 121 >>

(a) EXTENSION OF DUTIES.--Section 36 of the Act entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes", approved August 5, 1909 (36 Stat. 111; 46 U.S.C. App. 121), is amended--

***28**

(1) by striking "9 cents per ton" and all that follows through "2002," the first place it appears and inserting "4.5 cents per ton, not to exceed in the aggregate 22.5 cents per ton in any one year, for fiscal years 2006 through 2010,"; and

(2) by striking "27 cents per ton" and all that follows through "2002," and inserting "13.5 cents per ton, not to exceed 67.5 cents per ton per annum, for fiscal years 2006 through 2010,".

<< 46 App. USCA § 132 >>

(b) CONFORMING AMENDMENT.--The Act entitled "An Act concerning tonnage duties on vessels entering otherwise than by sea", approved March 8, 1910 (36 Stat. 234; 46 U.S.C. App. 132), is amended by striking "9 cents per ton" and all that follows through "and 2 cents" and inserting "4.5 cents per ton, not to exceed in the aggregate 22.5 cents per ton in any one year, for fiscal years 2006 through 2010, and 2 cents".

TITLE V--MEDICARE

Subtitle A--Provisions Relating to Part A

SEC. 5001. HOSPITAL QUALITY IMPROVEMENT.

(a) SUBMISSION OF HOSPITAL DATA.--Section 1886(b)(3)(B) of the Social Security Act (42 U.S.C. 1395ww(b)(3)(B)) is amended--

<< 42 USCA § 1395ww >>

(1) in clause (i)--

(A) in subclause (XIX), by striking "2007" and inserting "2006"; and

(B) in subclause (XX), by striking "for fiscal year 2008 and each subsequent fiscal year," and inserting "for each subsequent fiscal year, subject to clause (viii),";

(2) in clause (vii)--

(A) in subclause (I), by striking "for each of fiscal years 2005 through 2007" and inserting "for fiscal years 2005 and 2006"; and

(B) in subclause (II), by striking "Each" and inserting "For fiscal years 2005 and 2006, each"; and